



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 29, 1996

Mr. John Steiner
Division Chief
City of Austin Law Department
P.O. Box 1088
Austin, Texas 78767-1088

OR96-0822

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 37692.

The City of Austin (the "city") received an open records request for, among other things, the winning proposal to develop an air cargo facility at the new Austin-Bergstrom International Airport submitted to the city by Austin CargoPort Development, L.L.C. ("CargoPort"). You make no argument on behalf of the city that the requested information is excepted from required public disclosure. However, you have requested a decision from this office pursuant to section 552.305 of the Government Code as to whether the proposal or portions thereof constitute public information under the Open Records Act.

In accordance with section 552.305, a representative for CargoPort has submitted to this office arguments for withholding the proposal from the public at this time pursuant to section 552.110 of the Government Code. Section 552.110 excepts from required public disclosure

[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

This section protects two categories of information: 1) trade secrets, and 2) commercial or financial information.

The information at issue is clearly commercial information. To fall within section 552.110, however, the information must be "privileged or confidential by statute or judicial decision." See Open Records Decision No. 639 (1996). Section 552.110 is patterned after section 552(b)(4) of the federal Freedom of Information Act, 5 U.S.C. section 552 *et. seq.* Open Records Decision Nos. 309 (1982), 107 (1975). The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4) is as follows:

a commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have *either* of the following effects: 1) to impair the Government's ability to obtain necessary information in the future, *or* 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. (Emphasis added.)

National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). A factor to be considered in these tests is whether the information is of a type that is customarily released to the public. See, e.g., *AT&T Information Systems, Inc. v. General Services Administration*, 627 F. Supp. 1396, 1403 (D.D.C. 1986), *rev'd on other grounds*, 810 F.2d 1233 (D.C. Cir. 1987).

As to the first test, the governmental body that maintains requested information is in the best position to determine whether disclosure will impair its ability to obtain similar information in the future. Although you have expressed no opinion on this subject, it is evident to this office that because the city required that the proposal be submitted as part of the competitive bidding process, the proposal may not be withheld pursuant to section 552.110 on these grounds. See, e.g., *Bangor Hydro-Elec. Co. v. United States Dep't of the Interior*, No. 94-0173-B, slip op. at 9 (D. Me. Apr. 18, 1995) (no impairment because "it is in the [submitter's] best interest to continue to supply as much information as possible" in order to secure better usage charges for its lands); *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed").

If the second test is satisfied, however, the information may be withheld. The courts have held that

in order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. *Actual competition and the likelihood of substantial competitive injury* is [sic] all that need be shown. (Emphasis added.)

Gulf & Western Industries v. United States, 615 F.2d 527, 530 D.C. Cir. 1979); see also *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976). "Conclusory and generalized allegations" of competitive harm have been held insufficient to satisfy the requirements for non-disclosure. See *Kleppe*, 547 F.2d at 680.

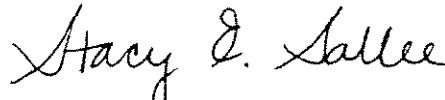
In this instance, however, CargoPort has informed this office that it is currently engaged in a "heated competition" for tenants of its facilities with CargoAire, another developer with rights to develop air cargo facilities at the airport. Thus, CargoPort argues, any public dissemination of CargoPort's proprietary financial and other strategic information at this time "would have a devastating effect, both on CargoPort's ability to effectively compete with CargoAire, as well as its ability to effectively negotiate with potential tenants." Based on the information presented to us, we conclude that CargoPort has demonstrated that actual competition currently exists and the likelihood of substantial competitive injury that would result from the release of certain portions of the CargoPort proposal. Consequently, the city must withhold the following portions of the proposal in response to the current request:

- Preface (b) - Executive Summary
- II.(a) - Project Approach
- II.(b) - Operation and Procedure Manual
- II.(c) - Marketing Plan
- II.(g) - Itemized Construction Costs
- II.(h) - Architect's Drawing of Facilities
- V.(a) - Financial Statements
- V.(c) - Development Cost
- V.(d) - Projected Operating Pro Forma
- V.(e) - Pro Forma Assumptions

The city must release, however, the remaining portions of the proposals at this time.¹

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

¹Because we resolve your decision request under the "commercial information" arm of section 552.110, we need not address at this time CargoPort's contentions that the information at issue constitutes "trade secrets" under section 552.110 except to say that CargoPort has not met its burden in demonstrating how the portions of its proposal not otherwise protected as "commercial information" constitute "trade secret" information.

SES/RWP/rho

Ref.: ID# 37692

Enclosure: Proposal

cc: Mr. Alex De Marban
905 East 44th Street
Austin, Texas 78751
(w/o enclosure)